EXHIBIT G

Brief of Plaintiff-Appellant Anderson,
Anderson v. House of Good Samaritan Hosp., 2003 WL 25660445

2003 WL 25660445 (N.Y.A.D. 4 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, Fourth Department, New York.

Michelle ANDERSON, Plaintiff-Appellant,

v.

HOUSE OF GOOD SAMARITAN HOSPITAL, Mercy Hospital of Watertown, d/b/a Mercy Center for Health Services, d/b/a Community Mental Health Center, Maritza Santana, M.D., David T. Gavan, M.D., Jane L. Hyland, M.D., Philip Tatnall, M.D., Defendants-Respondents.

Nos. 1298, 03-00830.
July 30, 2003.

The Plaintiff-Appellant's Reply Brief

John A. Cirando, Esq., Lisa M. Cirando, Esq., Susan R. Rider, Esq., Mickelle A. Olawoye, Esq., of Counsel, Carroll & Carroll, Lawyers, P.C., Attorneys for Plaintiff-Appellant, D.J. & J.A. Cirando, Esqs, Of Counsel, 101 South Salina Street, Suite 1010, Syracuse, New York 13202, (315) 474 - 1285.

*i TABLE OF CONTENTS

*ii TABLE OF AUTHORITIES

Cases

Statutes

APPENDIX

Appendix A - Appellate Division, Fourth Department Order, entered June 11, 2003SY ***1 PRELIMINARY STATEMENT**

This Brief is submitted in response to the Briefs of defendants Mercy Hospital of Watertown, d/b/a Mercy Center for Health Services, d/b/a Community Mental Health Center; Maritza Santana, M.D.; David T. Gavan, M.D. and Jane L. Hyland, M.D.; and Philip Tatnall, M.D.

This Brief is also submitted in response to defendant, House of Good Samaritan Hospitals Letter Brief, adopting the legal arguments of the other defendants.

***2** Doctors Gavan and Hyland did not respond to Appellants Point I. Dr. Santana did not respond to Appellants Point II.

By Order, entered June 11, 2003, this Court extended the time for appellant to file and serve her Reply Brief, until on or before July 31, 2003 *(Order entered June 11, 2003, Appendix A)*.

POINT I

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S DISCOVERY REQUEST FOR DISCLOSURE OF INSURANCE POLICIES UNDER CIVIL PRACTICE LAW AND RULES 53101(F) .

Disclosure of insurance information, pursuant to CPLR §3101(f), includes all policies in force on the date of the partys injury (*Krogh v. K-Mart Corp.,* 108 A.D.2d 966). The primary motivation for this kind of disclosure provision is to facilitate and encourage settlement (*Kimbell v. Davis,* 81 A.D.2d 855). Furthermore, CPLR §3101(f) has been broadly interpreted to include discovery of any policies which might provide insurance benefits for any damages potentially imposed upon the party requesting disclosure (*Sprague v. International Business Machines, Corp.,* 120 A.D.2d 514). Moreover, discovery pursuant to CPLR §3101(f) is not limited to production of the insurance policy; plaintiff is entitled to discover those matters bearing upon the existence and scope of coverage (see ***3** *PCB Piezotronics, Inc. v. Change,* 179 A.D.2d 1089 [4th Dept.]).

Liberal discovery is favored, and pretrial disclosure extends not only to proof that is admissible, but also to matters that may lead to the disclosure of admissible proof (*Twenty Four Hour Fuel Oil Corp. v. Hunter Ambulance, Inc.*, 226 A.D.2d 175; *Perrotte v. Eli Lilly, Co.*, 171 A.D.2d 119, 123; *Fell v. Presbyterian Hospital,* 98 A.D.2d 624, 625).

Moreover, concerns with disclosing confidential information can be alleviated by the parties entering into a Stipulation of Confidentiality (see *Twenty Four Hour Fuel Oil Corp., supra* at 176).

...as to Mercy Hospital.

Mercy Hospital claims that the trial courts Order denying disclosure of their entire insurance policy should be upheld because disclosure of such material has been granted in only two limited circumstances: (1) to ascertain the existence of a policy, or (2) where recovery could be limited because of payments of prior claims (see *Mercy Hospital's Brief, p. 6*).

Mercy Hospital then claims that neither of these circumstances existed in this case, and therefore, disclosure was not warranted (see *Mercy Hospital's Brief, p. 6*).

Moreover, Mercy Hospital claims that since appellant requested disclosure of insurance for the purpose of recovery, and not because it would lead to admissible proof, ***4** then appellants request was properly denied (see Mercy Hospital's Brief, p. 7).

Finally, Mercy Hospital claims that the trial court did not abuse its discretion by denying disclosure because the insurance policy contained numerous provisions, riders, limitations and exclusions which were not relevant to this case; the insurance policy was deemed confidential; the attorneys for the various defendants stated the insurance coverage on the record; and, appellant did not provide any reason to believe that the information provided by the attorneys was incorrect or unreliable, therefore, disclosure was not warranted (*see Mercy Hospital's Brief, pp. 7-8*). Therefore, Mercy claims the trial courts decision should be upheld *(see Mercy Hospital's Brief, p. 8)*.

It is respectfully submitted that Mercys claims are not supported by current case law. This Court has held that a plaintiff is entitled to disclosure not only of insurance policies in effect on the date of the incident, but also entitled to disclosure of matters bearing on the existence and scope of coverage see *Kroqh, supra; PCB Piezotronics, supra*). In the instant case, appellant has merely requested disclosure of any and all insurance policies in force on the date of appellants injuries (17). Moreover, disclosure in this instance certainly could facilitate and encourage settlement, which is the primary purpose of requiring disclosure of insurance policy information under ***5** CPLR §3101(f) (see *Kimbell, supra*).

Mercy Hospital incorrectly claims that disclosure should not be granted because appellant requested the information for recovery purposes, rather than for admissible proof at trial. The primary motivation for liberal disclosure of insurance information was to facilitate and encourage settlement. Surely this goal can only be accomplished through disclosure of insurance information for recovery purposes ?? appellant seeks (17). The courts have not ?? re of insurance policy information will ?? if it is admissible at trial.

Mercy Ho?? disclosure has been denied because the r s contained information not relevant to ?? are confidential. Surely the trial court could have viewed the policies *in camera,* and redacted any confidential or irrelevant information prior to disclosure to appellant (see *Twenty Four Hour Fuel Oil Corp., supra*).

Appellant is entitled to disclosure of copies of all insurance policies in effect on the dates of the incident in question (see *Krogh, supra;* see also *Love v. Meisner,* 107 Misc.2d 1003). The trial court erred in denying appellant this information, and its determination should be reversed, and the matter remitted to the trial court (see *Perrotte, supra*).

***6 ...as to Philip Tatnall, M.D.**

Dr. Tatnall claims that the trial court properly denied appellants request for copies of his liability insurance policy because appellant had been provided policy limits; appellant had not set forth any compelling reason to require disclosure of these insurance policies; and, appellant had no reason or need to have copies of the insurance policies because no recovery had been had to date (see *Doctor Tatnall's Brief,* pp. 3-4).

It is respectfully submitted that Dr. Tatnalls arguments are misplaced. Recovery is not a pre-requisite to disclosure of insurance policies (see *Krogh, supra; Kimbell, supra; PCB Piezotronics, Inc., supra*). Liberal disclosure under CPLR §3101(f) facilitates and encourages settlement (see *Twenty Four Hour Fuel Oil Corp., supra*). In fact, the possibility that settlement may result from disclosure is reason enough for disclosure (see *Twenty Four Hour Fuel Oil Corp., supra*).

As such, the trial court should have required Dr. Tatnall to disclose copies of all of his insurance policies in effect on the dates of the incident in question (see *Krogh, supra; Kimbell, supra; PCB Piezotronics, Inc., supra*).

***7 ...as to Maritza Santana, M.D.**

Dr. Santana claims that appellant was not entitled to any copies of reinsurance agreements because they are not relevant to this action *(see Doctor Santana's Brief, p. 3)*. Dr. Santana also claims that even though her primary insurance carrier, Legion Insurance Company, is in reorganization proceedings, there has been no representation to appellant that once the stay has been lifted concerning this insurance company the policy would not be effective or available *(see Doctor Santana's Brief, p. 5)*. In addition, Dr. Santana claims that since none of appellant s case law speaks to disclosure of reinsurance policies, appellant is not entitled to copies of the reinsurance policy *(see Doctor Santana' Brief, p. 5)*.

It is respectfully submitted that appellant is entitled to copies of Dr. Santanas reinsurance policy because appellant is entitled to disclosure of any insurance policies in effect on the dates of the incident in question (see *Krogh, supra; Sprague, supra*). Moreover, disclosure of insurance policies could only advance the goals of the statute---facilitate and encourage settlement (see *Kimbell, supra*).

As such, appellant is entitled to all insurance policies from all defendants in effect on the date of the incident (see *Krogh, supra; Sprague, supra*).

***8 POINT II**

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO DETERMINE WHETHER THE DOCTORS WERE EMPLOYED AT THE HOSPITALS, AND IF SO, WHAT THEY COULD DO AT THOSE HOSPITALS.

The purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of lawsuits (see *Byork v. Carmer,* 109 A.D.2d 1087, 1088 [4th Dept.]; see also *Rios v. Donovan,* 21 A.D.2d 409, 411).

Education Law §6527[3] guarantees confidentially to quality review and malpractice prevention proceedings (*Logue v. Velez,* 92 N.Y.2d 13; see also *Byork, supra*). Public Health Law §2805-m confers complete confidentiality on information gathered by a hospital in accordance with Public Health Law §§2805-j and 2805-k, expressly exempting it from disclosure under CPLR Article 31 (see *Logue, supra* at 17).

Public Health Law §2805-j consists of a periodic review of a physicians credentials and competency. Public Health Law §2805-k consists of information gathered in furtherance of granting or renewing professional privileges, such as detailed information from a physician outlining his professional experience, incidents of misconduct, education and training (see also *Logue, supra* at 17) . As such any materials used by a hospital in quality review and malpractice prevention programs is strictly confidential (see *Logue, supra* at 19).

The cloak of confidentiality covering quality assurance ***9** procedures and materials is designed to encourage thorough and candid peer review, and thereby, improve the quality of care (see *Logue, supra*).

At the outset, it should be noted that all appellant is seeking is whether the doctors were employed at the hospitals, and if so, what they could do at those hospitals (17).

...as to Mercy Hospital, David T. Gavan, M.D. and Jane L. Hyland, M.D.

Mercy Hospital and Doctors Gavan and Hyland claim that appellant was not entitled to information concerning staff privileges of Doctors Soncrant and Dorman because they were not employees of Mercy or House of Good Samaritan Hospitals, but rather, were employees of the U.S. Army at the time this incident occurred (see Mercy Hospital's Brief, pp. 8-9; Doctors Gavan and Hyland's Brief, pp. 6-7). Doctors Gavan and Hyland also claim that information concerning staff privileges is a quality assurance function and therefore not subject to disclosure (see Doctors Gavan and Hyland's Brief, p. 6).

Moreover, Mercy Hospital claims that neither doctor [Soncrant or Dorman] was named as a defendant in this lawsuit, nor had appellant claimed that either of these doctors [Soncrant or Dorman] were negligent (see *Mercy Hospital's Brief, p. 8-9*). Therefore, Mercy Hospital claims ***10** that it is irrelevant whether these doctors [Soncrant or Dorman] had staff privileges (see *Mercy Hospital's Brief, p. 8*).

Mercy Hospital also claims that information concerning staff privileges regarding Doctors Hyland, Santana and Tatnall was disclosed to the trial court for *in camera* review, and it has no idea what the trial court has done with that information (see Mercy Hospital's Brief, pp.9-10). Mercy Hospital also claims that appellant has failed to show any need for information concerning details of the doctors [Hyland, Santana, Tatnall] working relationships or their salaries (see Mercy Hospital's Brief, p. 10). In addition, Mercy Hospital claims that an *in camera* review by the trial court was appropriate because the information requested was privileged as quality assurance material (see Mercy Hospital's Brief, p. 10).

It is respectfully submitted that Mercy Hospitals and Doctors Gavan and Hylands arguments are misplaced. Whether Doctors Soncrant and Dorman were employees or staff members, or had staff privileges, at Mercy Hospital or the House of Good Samaritan Hospital, has yet to be determined.

During his Deposition, Dr. Dorman testified that he was a staff member of the House of Good Samaritan Hospital (17) Dr. Dorman further testified that Dr. Soncrant was not a staff member of the House of Good Samaritan Hospital (17). ***11** Appellant, however, cannot rely solely upon Dr. Dormans testimony at a Deposition as proof to resolve these issues (17). Therefore, it is incumbent upon appellant to receive employee and staff membership, and staff privilege information on these two doctors before trial (17).

Neither Mercy Hospital, nor the doctors themselves, can be harmed by a showing that neither doctor was an employee, a staff member or had staff privileges at their facility at the time of the incident. If anything, Mercy Hospitals disclosure that neither doctor was an employee, staff member or had staff privileges could only expedite this case, and advance the function of a trial to ascertain truth and to accelerate the disposition of this lawsuit (see *Byork, supra*).

Moreover, Mercy Hospital claims that since information concerning staff privileges regarding Doctors Hyland, Santana and Tatnall had been disclosed for *in camera* inspection, then they have done all that is required (see Mercy Hospital's Brief, p. 9-10). Furthermore, Mercy Hospital claims that the *in camera* review was appropriate because the information requested was privileged as quality assurance material (see Mercy Hospital's Brief, p. 10).

However, it is respectfully submitted that the trial court erred by requiring an *in camera* inspection of the material, and then failing to disclose any information to appellant. The quality assurance privilege only extends to ***12** information gathered during the quality assurance process (see *Logue, supra; Byork, supra*). In the case at bar, appellant merely requested the disclosure of a list of employees and their staff privileges (17). Employee and staff privilege listings must be compiled by Mercy Hospital for functions other than quality assurance or malpractice prevention tools. Moreover, a facility may not create a privilege, where none would otherwise exist, merely by assigning the duty for compliance or compilation to a quality assurance committee (see *Park Associates v. N.Y. State AG* (*In re Subpoena Duces Tecum to Jane Doe*), 99 N.Y.2d 434). As such, the material cannot be claimed as privileged as solely quality assurance material (see *Park Associates, supra*).

It should be noted that although appellant never heard from the trial court regarding its *in camera* review, counsel for the House of Good Samaritan Hospital has recently furnished, to appellants counsel of record, the Applications for staff privileges of Doctors Gavan and Santana.

...as to Philip Tatnall, M.D.

Dr. Tatnall claims that the trial court properly denied appellants request to obtain staff privileges because Education Law §6527 and Public Health Law §2805-m make these documents privileged and exempt from disclosure (see *Doctor Tatnall's Brief, p. 5*).

***13** It is respectfully submitted that Dr. Tatnalls claims concerning privileges are incorrect. The privileges afforded under Education Law §6527 and Public Health Law §2805-m concern only those materials produced in furtherance of quality assurance and malpractice proceedings (see *Park Associates, supra*). Whether Dr. Tatnall was employed, and if so employed what his job duties entailed, certainly could not have been produced strictly in furtherance of quality assurance or malpractice proceedings (see *Park Associates, supra*). As such, the material cannot be claimed privileged.

...as to David T. Gavan, M.D.

Dr. Gavan claims that since he is no longer a party to the action, then appellant is not entitled to his staff privilege information (*see Doctors Gavan and Hyland's Brief, p. 7*). Moreover, Dr. Gavan also claims that even if that Summary Judgment is reversed, appellant is not entitled to his employment records, including licensing documents, because they are privileged and confidential as quality assurance materials under Education Law §6527(3) (see *Doctors Gavan and Hyland's Brief, pp. 7-8*). Dr. Gavan also claims that since this Court previously denied appellant access to his employment records, then this Courts previous decision is the law of the case (see *Doctors Gavan and Hyland's Brief, p. 8*).

***14** It is respectfully submitted that whether Summary Judgment in favor of Dr. Gavan should have been granted is still an issue to be resolved by this Court. The Record on Appeal in regard to that appeal has been stipulated to by counsel, and Appellants Brief is being prepared. Upon Perfection of that appeal, a Motion to Consolidate that appeal with the instant appeal and the appeal in CA-03-0167 will be made.

Education Law §6527(3) does not exempt all material relating to licensing and employment, rather, the only material exempt from disclosure is information provided in furtherance of quality assurance or malpractice proceedings (see *Park Associates, supra*). Furthermore, this Court only denied access to Dr. Gavans employment, medical and Psychiatric records. However, appellant is not requesting these sale materials. Rather, appellant is only requesting cuments showing who employed Dr. Gavan, and as employed, that his staff privileges were (17) . As such, Dr. Gavans claim regarding the law of the case is misplaced. As such, Dr. Gavan should be directed to disclose the requested material.

Appellants request to determine if the defendants were employed at the Hospitals, and if so, what they could do at those Hospitals, should be granted, and each defendant ordered to disclose the requested information to facilitate this case (see *Byork, supra*).

***15 CONCLUSION**

THE TRIAL COURT'S MEMORANDUM DECISION AND ORDER SHOULD BE UNANIMOUSLY REVERSED.

Appendix not available.

End of Document